IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO. 70 OF 2007
IN
SUMMARY SUIT NO. 20 OF 2007

The Hongkong & Shanghai Banking Corporation Ltd. ... Plaintiff.

V/s.

Nadeem Zakaria Maklai. ... Defendant.

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Mr. Persy Ghandy with Ms. Vedpathak i/b. Maneksha & Sethna for the Plaintiff.
Mr. S.P. Bharati for the Defendant.

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CORAM : DR. D.Y.CHANDRACHUD,J.

03rd April 2007.

P.C. :

. The suit under Order 37 of the Code of Civil Procedure 1908 has been instituted to recover an amount of Rs.30,48,438/- together with interest at the rate of 18% per annum on the principal sum of Rs.20 lakhs.

2. An agreement of leave and licence was entered into between the parties on 6th March 2002, by which, the Plaintiff was granted a licence to use and occupy a residential flat (flat no.C-3 on the 3rd floor of Malabar Apartments Co-operative Housing Society Ltd., Jagmohandas Road, Mumbai - 400 006) admeasuring 750 sq.ft. The term of the licence was 11 months to commence on 10th March 2002 until 10th February 2003. Clause 4 of the agreement provided as follows :-

> " The Licensee shall, throughout the term of the licence hereby created, deposit and keep deposited with the Licensor as and by way of a security deposit an amount of Rupees Twenty Lakhs (Rs.20,00,000/-) and which amount of security deposit shall be refunded, without any interest thereon, by the Licensor to the Licensee on the expiry or sooner termination/determination of the Licence but after adjusting thereout any costs, charges, and expenses which

> the Licensor may be required to incur by reason of occupation and use of the licenced premises by the Licensee and which costs charges and expenses should have been met and borne by the Licensee in course of such occupation and use."

Clause 18 of the agreement stipulated that the security deposit of Rs.20 lakhs was to be returned to the Plaintiff within a week of the expiry/termination of the licence. In the event of the Defendant failing to do so within a week of such expiry/determination, the Defendant as Licensor was liable to pay interest at the rate of 18% per annum for the period of such default/delay and the Plaintiff as licensee was entitled to reside in the premises during the period of the delay without the payment of any rent. Under clause 21 the licence was terminable with one month's notice upon the expiry of the term of the licence.

3 The licence was renewed for a further period of 11 months commencing from 9th February 2003, by a letter dated 8th February 2003. On 27th September 2003, the Plaintiff terminated the agreement in pursuance of the provisions of clause 21 of the agreement with one month's notice. The Defendant was called upon to arrange for a refund of the security deposit and to issue a letter of having taken possession of the flat, certifying that the accessories and fixtures were in proper order.

4. The Defendant admitted his liability, by a letter dated 2nd January 2004 to refund the deposit but sought time to do so until the middle of February in the year 2004. The Plaintiff, not having received a refund of the deposit, addressed reminders dated 5th June and 10th June 2004. In response, the Defendant by a letter dated 7th July 2004 once again admitted his liability and requested the Plaintiff to grant him an indulgence of a few more days. Eventually, a suit has been instituted for a recovery of the security deposit.

5. The Defendant has not filed any defence to the claim in the suit thought he appears through Counsel. From the narration of the facts it is abundantly clear that the claim of the Plaintiff falls within the purview of Order 37 of the Code of Civil Procedure, 1908, since it is based on a written contract between the parties. On behalf of the Defendant, the maintainability of the Summary Suit is sought to the questioned in the course of the oral submissions on the ground that the pleadings of the Plaintiffs as they stand would not sustain a Summary Suit under Order 37 of the C.P.C. The submission is that the Plaintiff has not averred that he is willing to hand over possession of the residential premises to the Defendant. There is no merit in the submission for the simple reason that by a letter dated 27th September 2003, the Plaintiff has clearly evinced an intention to hand over possession against the return of the security deposit. In fact, the agreement between the parties stipulates that if the licensor fails to return the security deposit of Rs.20 lakhs

within a period of one week of the expiry/determination of the licence, he would be liable to pay interest of 18% per annum and in the meantime the Plaintiff would be entitled to retain possession without the payment of rent. The agreement did not contemplate that the Plaintiff as licensee must first surrender possession and then institute proceedings for the recovery of its security deposit. The Summary Suit is clearly maintainable. The objection in regard to the maintainability of the Summary Suit has been considered by the Court since it proceeded on the basis of the pleadings as they stand. However, it needs to be emphasised that no written defence has been filed on behalf of the Defendant to the Suit.

6. The Plaintiff would be entitled to a decree as prayed. Counsel appearing on behalf of the Plaintiff has stated before the Court that the Plaintiff is ready and willing to tender an undertaking that possession of the premises would be handed over to the Defendant immediately against the receipt of the decretal dues. Counsel appearing on behalf of the Defendant objects to the

recording of any such undertaking since the submission of the Defendant is that the Defendant has obtained possession of the premises. This is disputed on behalf of the Plaintiff. Nonetheless, in view of the objection which the Defendant has to the recording of the Plaintiff's undertaking to hand over possession against the receipt of the decretal dues, the suit shall have to be decreed in terms of prayer clause (1). There shall be a decree accordingly.